

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
 A Limited Liability Partnership  
 Including Professional Corporations  
 TRACEY A. KENNEDY, Cal. Bar No. 150782  
 NAMAL TANTULA, Cal. Bar No. 247373  
 BRETT YOUNG, Cal. Bar No. 305657  
 333 South Hope Street, 43<sup>rd</sup> Floor  
 Los Angeles, California 90071-1422  
 Telephone: 213.620.1780  
 Facsimile: 213.620.1398  
 Email: tkennedy@sheppardmullin.com  
 ntantula@sheppardmullin.com  
 byoung@sheppardmullin.com

PATRICIA M. JENG, Cal. Bar No. 272262  
 SUSAN HAINES, Cal. Bar No. 224611  
 Four Embarcadero Center, 17<sup>th</sup> Floor  
 San Francisco, California 94111-4109  
 Telephone: 415.434.9100  
 Facsimile: 415.434.3947  
 Email: pjeng@sheppardmullin.com  
 shaines@sheppardmullin.com

Attorneys for Defendants,  
 TESLA, INC. dba TESLA MOTORS, INC.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

DEMETRIC DI-AZ, OWEN DIAZ, AND  
 LAMAR PATTERSON,

Plaintiffs,

v.

TESLA, INC. DBA TESLA MOTORS, INC.;  
 CITISTAFF SOLUTIONS, INC.; WEST  
 VALLEY STAFFING GROUP;  
 CHARTWELL STAFFING SERVICES,  
 INC.; and DOES 1-50, inclusive,

Defendants.

Case No. 3:17-cv-06748-WHO

**DEFENDANT TESLA, INC.'S MOTIONS**  
***IN LIMINE***

Date: May 11, 2020  
 Time: 10:00 a.m.  
 Courtroom: 2, 17<sup>th</sup> Floor  
 Judge: Hon. William H. Orrick

Trial Date: June 8, 2020  
 Complaint Filed: October 16, 2017

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. NOTICE OF MOTION.....	1
II. MOTIONS <i>IN LIMINE</i> .....	1
A. Motion <i>in Limine</i> No. 1 – Exclude Putative “Me Too” Witnesses Represented by Plaintiff’s Counsel .....	1
1. Dewitt Lambert – Discovery of “Me Too” Evidence Previously Denied .....	5
2. Nathan Fraim – Not at Tesla When Plaintiff Was There.....	6
3. Titus McCaleb – Not at Tesla When Plaintiffs Were There.....	6
4. Nigel Jones – Different Department, Different Job, Different Supervisors .....	8
5. Jakel Williams – Different Department, Different Job, Different Supervisors.....	9
6. Melvin Berry – Different Department, Different Job, Different Supervisors.....	10
7. Demetric Di-az – Former Plaintiff in a Different Department, Different Job, Different Supervisors .....	11
B. Motion <i>In Limine</i> No. 2 – Exclude Putative “Me Too” Documentary Evidence .....	11
1. Unrelated Complaints Made to West Valley After Plaintiff’s Assignment at Tesla Ended.....	12
2. Unrelated Complaint About a Car Name After Plaintiff’s Time at Tesla .....	13
3. Unrelated Complaints About Restroom Graffiti After Plaintiff’s Time at Tesla.....	14
4. Unauthenticated Document Never Produced In Discovery .....	15
5. Email Not Produced in Discovery and Sent After Plaintiff’s Time at Tesla.....	17
6. Unrelated Complaint About Person Plaintiff Did Not Know .....	18
7. Unrelated Complaint From Person in Different Work Area with Different Supervisors Than Plaintiff .....	18
C. Motion <i>In Limine</i> No. 3 – Putative “Me Too” Witnesses to Be Limited to Percipient Witness Testimony .....	20
1. Former Plaintiff Lamar Patterson .....	20
2. Tamotsu Kawasaki.....	22
3. Michael Wheeler .....	22
4. Wayne Jackson – nextSource On-Site Representative .....	23
D. Motion <i>In Limine</i> No. 4 - Exclude Impermissible Demonstratives and Shock Props .....	24
III. CONCLUSION.....	25

**TABLE OF AUTHORITIES****Page(s)****FEDERAL CASES**

<i>Boyd v. City of San Francisco</i> 576 F.3d 938 (9th Cir. 2009) .....	25
<i>Brodit v. Cambra</i> 350 F.3d 985 (9th Cir. 2003) .....	1
<i>Cohn v. Papke</i> 655 F.3d 191 (9th Cir. 1981) .....	24, 25
<i>Duran v. City of Maywood</i> 221 F.3d 1127 (9th Cir. 2000) .....	3, 4, 12
<i>Hill v. Grade</i> No. 18-cv-01474-HSG (N.D. Cal. Sep. 4, 2019) .....	3, 4, 12
<i>Luce v. United States</i> 469 U.S. 38 (1984) .....	1
<i>Moorhouse v. Boeing Co.</i> 501 F.Supp. 390 (E.D. Pa. 1980) .....	4
<i>Obrey v. Johnson</i> 400 F.3d 691 (9th Cir. 2005) .....	2-4
<i>Sprint/United Management Co. v. Mendelsohn</i> 552 U.S. 379 (2008) .....	2

**FEDERAL RULES****Federal Rules of Civil Procedure**

Rule 26(a) .....	1, 15
Rule 26(e) .....	1, 15
Rule 37(c)(1) .....	<i>passim</i>

**Federal Rules of Evidence**

Rule 401 .....	<i>passim</i>
Rule 402 .....	<i>passim</i>
Rule 403 .....	<i>passim</i>
Rule 602 .....	<i>passim</i>
Rule 801 .....	1, 17
Rule 802 .....	1, 17
Rule 807 .....	1, 17
Rule 901 .....	1, 16
Rule 901(a) .....	1, 16

OTHER AUTHORITIES

<https://www.nytimes.com/2001/12/01/books/a-black-author-hurls-that-word-as-a-challenge.html> ..... 24

**I. NOTICE OF MOTION**

To all parties and counsel of record, please take notice that on May 11, 2020 at 10:00 a.m., Defendant Tesla Motors, Inc. (“Tesla”) will move this Court for an order *in limine* excluding the following: (1) testimony of putative “me too” witnesses represented by plaintiff’s counsel; (2) putative “me too” documentary evidence and testimony regarding same; (3) testimony of putative “me too” witnesses’ regarding conduct not directly involving plaintiff; and (4) impermissible demonstratives and shock props. Tesla’s *in limine* motions are based on Federal Rules of Evidence 401, 402, 403, 602, 701, 801, 802, 807 and 901, Federal Rules of Civil Procedure 26 and 37, this notice and motion, the supporting memorandum of points and authorities and declaration (and exhibits thereto), all pleadings and papers on file in this action, and any argument presented at the hearing.

**II. MOTIONS IN LIMINE**

A party may use a motion *in limine* to exclude inadmissible or prejudicial evidence before it is introduced at trial. *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). A motion *in limine* allows the parties to resolve evidentiary disputes before trial and avoids potentially prejudicial evidence being presented in front of the jury, which generally cannot be subsequently remedied. *Brodit v. Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003).

**A. Motion in Limine No. 1 – Exclude Putative “Me Too” Witnesses Represented by Plaintiff’s Counsel**

Tesla seeks to exclude the following “me too” witnesses from testifying at trial: DeWitt Lambert, Nathan Fraim, Titus McCaleb, Nigel Jones, Jackel William, and Melvin Berry, on the grounds that their testimony is not relevant because they are non-parties represented by Plaintiff Owen’s Diaz’s<sup>1</sup> counsel in other cases and their purported information about Defendant is not sufficiently similar to Plaintiff’s allegations to permit the testimony. None of these “me-too” have any information about Owen Diaz and his working environments, or *any* of the alleged harassers in this case. The “me too” witnesses’ information about their respective working environments does not have any probative value to Plaintiff and such information, if it has even a slight probative value, would be outweighed by the undue delay

---

<sup>1</sup> Demetric Di-az has been dismissed, and this is single plaintiff case now.

1 and waste of time caused by the need to hold a trial within a trial on each “me too” witness’ claim, which  
 2 would unfairly prejudice Defendant and confuse or mislead the jury. The evidence must be excluded  
 3 because: 1) the witnesses’ testimony are not relevant to Plaintiff’s claims that Tesla violated the law with  
 4 respect to Owen; 2) the probative value of such evidence is substantially outweighed by its prejudicial  
 5 effect; and 3) introduction of “me too” evidence would confuse the issues for the jury and consume  
 6 undue court resources, and require Tesla to have several trials within a trial.

7 Based on Plaintiff’s exchange of Motions in Limine, Plaintiff seeks to introduce an array of “me  
 8 too” witnesses while simultaneously attempting exclude “me too” witnesses from testifying about  
 9 whether any alleged “n-word” they heard was offensive to them. Plaintiff concedes in their exchange<sup>2</sup>  
 10 that “there is no proof these witnesses heard the n-word in the same context or on the same occasions as  
 11 Plaintiffs,” which “invites the jury to conflate the [me too witnesses’] unrelated experiences to Plaintiffs’  
 12 experiences. The risk of misleading and confusing the trier of fact is so high that the evidence must be  
 13 excluded.” Plaintiff’s purported reasons for excluding “me too” witnesses from testifying about the  
 14 offensiveness of the n-word are reasons they should be excluded altogether.

15 Only relevant evidence is admissible. Fed. R. Evid. 401, 402. Relevant evidence is defined as  
 16 evidence that “has any tendency to make an act more or less probable than it would be without the  
 17 evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401. Otherwise  
 18 relevant, admissible evidence may still be excluded “if its probative value is substantially outweighed by  
 19 the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury,  
 20 undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

21 Whether evidence of harassment by other supervisors is relevant and admissible in an individual  
 22 case is “fact based and depends on many factors, including how closely related the evidence is to the  
 23 plaintiff’s circumstances and theory of the case.” *Sprint/United Management Co. v. Mendelsohn*, 552  
 24 U.S. 379, 388 (2008). But anecdotal evidence about past discrimination may not be admissible in the  
 25 “typical case of individual discrimination,” versus a case involving claims alleging a pattern or practice  
 26 of discrimination. *Obrey v. Johnson*, 400 F.3d 691, 698 (9th Cir. 2005). The district court retains broad  
 27

28 <sup>2</sup> The quoted material is from Plaintiff’s initial exchange of Motions *In Limine* as required by the  
 Amended Pretrial Order.

1 discretion to determine whether the probative value of any such evidence would be substantially  
2 outweighed by considerations of “undue delay, waste of time, or needless presentation of cumulative  
3 evidence.” *Id.* (citations omitted). Plaintiff has not alleged claims relating to a pattern or practice of  
4 alleged discrimination.

5 As a practical matter, courts evaluate the *Obrey* criteria by determining whether a plaintiff has  
6 made a sufficient showing that the witnesses were similarly situated to plaintiff such that the proffered  
7 evidence is relevant. *See, e.g., Hill v. Grade*, No. 18-cv-01474-HSG, at \*3-4 (N.D. Cal. Sep. 4, 2019)  
8 (citing *Obrey*, 400 F.3d at 698). In *Grade*, there were 3 proposed “me too” witnesses but each involved  
9 different discrimination allegations, that the trial court found they warranted exclusion. For example,  
10 none of the three witnesses had the same supervisors as plaintiff, none had the same job duties as plaintiff  
11 and none were subject to the same conduct as that alleged by plaintiff. *Id.* In excluding the three “me  
12 too” witnesses, the Court found that plaintiff “failed to show how the proffered testimony regarding these  
13 complaints, made by employees in entirely different circumstances, has any probative value on the  
14 question of whether Defendant had a discriminatory attitude towards Plaintiff's protected classes.” *Id.*

15 Even if the “me too” evidence meets some criteria under *Obrey* or *Grade*, the probative value of  
16 the evidence may be substantially outweighed by the factors enumerated in Rule 403. Of particular  
17 concern, when a party seeks to bring in evidence of other act or alleged misconduct, is the danger of  
18 unfair prejudice. *See, e.g., Duran v. City of Maywood*, 221 F.3d 1127, 1133 (9th Cir. 2000). In addition,  
19 Rule 403’s admonition to avoid confusing the issues, misleading the jury, undue delay, and wasting time  
20 must be considered. In *Duran*, the trial court’s decision to exclude evidence of a similar shooting was  
21 upheld on appeal. The trial court recognized that to admit evidence about the other shooting, the court  
22 would need to hold a “fullblown trial within this trial.” *Id.* at 1133. Likewise, in *Grade*, the court found  
23 “the complaints are only relevant if the complained-of discrimination actually occurred.” *Hill v. Grade*,  
24 No. 18-cv-01474-HSG, at \*3-4 (N.D. Cal. Sep. 4, 2019) . Because none of these findings had been made  
25 as to the non-party “me too” witnesses would require “time-consuming mini trials to adjudicate the truth  
26 or falsity of the complaints made by each of the three witnesses.” *Id.* The mini trial would result in any  
27 probative value of the “me too” evidence being “substantially and decisively outweighed by the danger  
28 that the evidence will confuse the issues, mislead the jury, unfairly prejudice Defendant, and waste time.”

1 *Id.* (citing Fed. R. Evid. 403); *see also Moorhouse v. Boeing Co.*, 501 F.Supp. 390 (E.D. Pa. 1980)  
 2 (excluding “me too” witnesses’ testimony about their own experiences because the defendants “would  
 3 have been placed in the position of either representing the justification for each witnesses’ layoff, or of  
 4 allowing the testimony to stand un rebutted...[and] forced, in effect to try all six cases together with the  
 5 attendant confusion and prejudice inherent in that situation”).

6 Here, Plaintiff’s purported “me too” evidence consists of Plaintiff’s counsel’s other clients (Dewitt  
 7 Lambert, Nathan Fraim, Titus McCaleb, Nigel Jones, Jackel William, and Melvin Berry) who retained  
 8 Plaintiff’s counsel in their respective, separate cases and who seek to bolster this case with their  
 9 anecdotal testimony about their individual work experiences at the Tesla Fremont facility. None of this  
 10 testimony is relevant because these “me too” witnesses all have one or more of the following  
 11 deficiencies: (1) they did not work at Tesla during the time Owen worked there; (2) they did not raise  
 12 any complaints about their work environment at Tesla during the time Owen worked there; (3) they did  
 13 not work with Owen; (4) they did not work in the same department as Owen; (5) they did not share the  
 14 same supervisors as Owen; and (6) none of the “me too” witnesses’ alleged harassers were the same as  
 15 those claimed by Owen. In other words, they are not “me-too” witnesses at all --just other plaintiffs in  
 16 other cases. Thus, there is no relevant connection between the work environment of the putative “me  
 17 too” witnesses and that of Owen, rendering the evidence irrelevant, as well as unduly prejudicial and  
 18 likely to mislead or confuse the jury. Each of these witness’ testimony should thus be excluded. *See*  
 19 *Obrey*, 400 F.3d at 698; *Hill v. Grade*, No. 18-cv-01474-HSG, at \*3-4 (N.D. Cal. Sep. 4, 2019); Fed. R.  
 20 Evid. 401-403.

21 Furthermore, each of these purported “me too” witnesses are non-parties. Their purported claims  
 22 of harassment or discrimination have been determined to have no merit or are currently pending and  
 23 have not been determined (as explained below). Because Tesla would be forced to rebut, refute, or  
 24 address each of the “me too” witnesses’ testimony about their alleged work environment, each would  
 25 require its own mini trial to determine if there was any merit to the claim, which would cause undue  
 26 delay and wasting time as well as unfairly prejudicing Defendant and purposely confusing and  
 27 misleading the jury. *Duran*, 221 F.3d at 1133; *Hill v. Grade*, No. 18-cv-01474-HSG, at \*3-4 (N.D. Cal.  
 28 Sep. 4, 2019); Fed. R. Evid. 403. All such putative “me too” witnesses’ testimony should be excluded.



1                   **1.       Dewitt Lambert – Discovery of “Me Too” Evidence Previously Denied**

2           Plaintiff’s initial attempts in this regard as to Dewitt Lambert, whom Plaintiff’s counsel  
3 represents, have already been rejected by this Court (Dkt. No. 93) in the much more liberal context of  
4 discovery. Specifically, the Court denied Plaintiff’s request (Dkt. No. 88) for documents relating to any  
5 investigation conducted into complaints made by Dewitt Lambert<sup>3</sup> and other individuals, stating that “the  
6 identified individuals’ experiences lack any connection with them [Owen and Demetric] in terms of time,  
7 proximity, department or alleged harasser Without such connection, plaintiffs are not entitled to this  
8 information.” Dkt. No. 93, 2:24-26. Therefore, in the narrower context of trial testimony, no testimony  
9 should be permitted.

10          Plaintiff’s Witness List<sup>4</sup> states Dewitt Lambert will testify he “was subjected to the N-Word and  
11 complained to HR.” Lambert worked at the Tesla facility from June 25, 2015 to July 2, 2018 and he was  
12 employed by Chartwell staffing agency. Tellingly, Lambert omits that the n-word he was allegedly  
13 subjected to were not by any of Plaintiff’s alleged harassers. This testimony should be precluded because  
14 as a production associate in the Chassis department, Dewitt Lambert worked in a different department  
15 and had different supervisors than Owen Diaz. Nor was he identified as an alleged harasser by Owen  
16 Diaz. As noted above, none of Dewitt Lambert’s alleged harassers were those alleged by Owen Diaz. In  
17 addition, based on the Witness List, his testimony will also encompass any of his alleged complaints he  
18 made to Human Resources, of which there is no evidence that Plaintiff was involved in or otherwise  
19 aware. Moreover, based on publicly filed documents, Dewitt Lambert’s claims of racial harassment were  
20 unsuccessfully arbitrated, with an arbitrator finding that he was not subject to racial harassment at Tesla.  
21 Testimony about Dewitt Lambert’s alleged experience with different supervisors, in a different  
22 department with different alleged harassers has no bearing on the alleged work environment of Owen  
23 Diaz. Fed. R. Evid. 401, 402. Likewise, any complaints he may have made to Human Resources and the  
24 outcome of those complaints is not relevant to Owen Diaz’s working environment. *Id.*

25  
26  
27 <sup>3</sup> This individual was identified in Plaintiff Owen Diaz’s Requests for Production, Set 3, No. 61.

28 <sup>4</sup> Due to the concurrent filing of pretrial documents, there is no Docket Number associated with Plaintiff’s Witness list, but all quotations are based on the last Witness List received by Plaintiff’s Counsel during the meet and confer process prior to filing these motions.

Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Dewitt Lambert should be excluded. The “me too” testimony should also be excluded under Rule 403 because many mini trials would be required to assess the validity of (1) each of his own complaints (the number is unknown); (2) each time he overheard his leads use the N-word (the number is unknown); (3) each time he overheard his supervisors use the N-word (the number is unknown); and (4) whether he made a complaint to Human Resources for each of the instances identified in (1) through (3); and (5) how it was handled by Human Resources.

## 2. Nathan Fraim – Not at Tesla When Plaintiff Was There

Nathan Fraim is represented by Plaintiff’s counsel and according to Plaintiff’s Witness List, he will testify about “racially harassing and discriminatory work environment” as well as “racist graffiti.” Since he began work on January 30, 2017, well after Owen Diaz was no longer at Tesla, he has no personal knowledge of Owen’s work environment nor could he have personal knowledge about any alleged graffiti in Owen’s work environment. Fed. R. Evid. 602. This is further established because Nathan Fraim had a different job (Material Handler), he worked in a different department and had different supervisors than Owen Diaz. Because he was in a different work area, it is unlikely that any alleged graffiti he saw would have been in the same locations where Owen Diaz now claims he saw graffiti. Again, Nathan Fraim does not allege that he was subjected to harassment by any of the alleged harassers claimed by Owen Diaz. Finally, he was not identified as an alleged harasser of Owen Diaz.

Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Nathan Fraim should be excluded. The “me too” testimony should also be excluded under Rule 403 because at least two mini trials would be required to assess the validity of any such claims about the work environment and his purported viewing of graffiti.

## 3. Titus McCaleb – Not at Tesla When Plaintiffs Were There

Titus McCaleb is also represented by Plaintiff’s counsel and has no personal knowledge about Owen Diaz. He testified, “ I don’t know who Owen Diaz is.” Haines Decl., Exh. 1 (6/18/19 T. McCaleb Dep.), 21:2-6; Fed. R. Evid. 602. Titus McCaleb began work with West Valley (different staffing agency than Owen Diaz) on October 19, 2016 –seven months *after* Owen Diaz’s last day at Tesla on March 18, 2016. *Id.* at 179:4-20 & Exhibit 3. Plaintiff’s Witness List states that Titus McCaleb will testify “he

1 witnessed and was called racial epithets, including the N-word” and that he “complained to Brandie To  
 2 who worked in HR.” Plaintiff has also included Brandie To on his witness list, though she was not  
 3 timely listed in Plaintiff’s Initial Disclosures (and Plaintiff did not seek leave from the Court to extend  
 4 that deadline), and states that she will testify “regarding Tesla’s response to Mr. McCaleb’s complaints  
 5 about the N-word in April and May 2017.” Here, it appears that Plaintiff is seeking to have the “me-too”  
 6 witness McCaleb and To as an alleged witness for this third party “me-too” witness who did not work at  
 7 Tesla when Plaintiff worked.

8 In addition to his testimony and Brandie To’s testimony, Plaintiff’s Exhibit List also identifies  
 9 emails between Titus McCaleb and Brandie To (Exhibit 22, Exhibit 71 and Exhibit 105),<sup>5</sup> as well as a  
 10 June 27, 2017 EEOC charge Titus McCaleb filed *after* working at Tesla (Exhibit 70) and West Valley’s  
 11 Confidential Position Statement to the EEOC in response (Exhibit 72).<sup>6</sup> All these documents and  
 12 testimony about any of these documents should also be excluded.

13 In addition to working at Tesla long after Plaintiff was there, Titus McCaleb did not work in the  
 14 same department or have the same supervisors as Owen Diaz. *Id.* at 34:23-35:21, 208:19-24. He worked  
 15 as a production associate, a media specialist, and a quality inspector in Powertrain. Haines Decl., Exh. 1  
 16 (6/18/19 T. McCaleb Dep.), 34:23-35:2, 47:25-48:5. Finally, none of the individuals identified in Titus  
 17 McCaleb’s emailed complaints or in his EEOC complaint are those of Owen Diaz’s alleged harassers.  
 18 *Id.* at 210:10-20, 211:21-212:20. He was also not identified as an alleged harasser of Owen Diaz.

19 Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Titus McCaleb and any  
 20 testimony about documents regarding Titus McCaleb should be excluded. That includes testimony from  
 21 Brandie To, about these complaints, the documents or Human Resources response to any of the  
 22 complaints. The documents relating to Titus McCaleb (Plaintiffs’ Exhibits 22, 70, 71, 72 and 105)  
 23 should also be excluded. The “me too” testimony and documents should also be excluded under Rule  
 24 403 because at least three, if not four mini trials would be required to assess the validity of each of the  
 25 two claims purportedly reported to Human Resources, the post-job EEOC charge and the response to the  
 26

27 <sup>5</sup> All produced emails involving this complaint (TESLA-0000919 – TESLA-0001002) should be  
 excluded for the same reasons.

28 <sup>6</sup> All documents relating to Titus McCaleb’s EEOC charge (WV000393 –WV000537) should also be  
 excluded.

charge. The undue delay and waste of time is amply demonstrated by the fact that Plaintiff identified at least two witnesses and at least five separate, lengthy exhibits in connection with these issues alone.

**4. Nigel Jones – Different Department, Different Job, Different Supervisors**

Also represented by Plaintiff’s counsel is Nigel Jones, who began work as a contractor with the job title of Fleet Coordinator on February 23, 2016, overlapping Owen Diaz’s time by just barely over one week. Plaintiff’s Witness List states that Nigel Jones will be testifying about multiple topics: (1) “knowledge of the racially harassing and discriminatory environment in Tesla’s Fremont factory;” (2) “racist comments like the N-word directed . . . at him;” (3) “racist comments directed at African American workers;” (4) “how his multiple complaints to HR in 2017 were not investigated or addressed;” and (5) “his transition from contractor to regular Tesla employee.”

Nigel Jones had a different job and worked in a different department with different supervisors than Owen Diaz. He was not identified as an alleged harasser of Owen Diaz. No information has been provided about his alleged claims about the N-word nor is there any information about comments he allegedly heard that were directed at other African Americans. His alleged complaints were made to Human Resources in 2017, long after Owen Diaz was at Tesla. Therefore, he could have no personal knowledge about Owen Diaz’s work environment. Fed. R. Evid. 602. Owen Diaz testified that he did not recognize Nigel Jones’ name at all. Haines Decl., Exh. 2 (12/3/18 O. Diaz Dep. ), 196:23-197:6.

Testimony about what Nigel Jones may have overheard being said to other unidentified African American workers, more than a year after Plaintiff was at Tesla, while Jones was doing a different job, in a different department with different supervisors than Owen Diaz has no bearing on the alleged work environment of Owen Diaz. Fed. R. Evid. 401, 402. Nor does any complaint Nigel Jones might make about himself from unspecified people when he was doing a different job, in a different department, with different supervisors than Owen Diaz. *Id.* Likewise, any complaints he may have made to Human Resources in 2017 (when Owen Diaz was no longer there) and the outcome of those complaints is not relevant to Owen Diaz’s working environment. *Id.*

As for Jones’ proposed testimony about changing from a contractor to a regular employee, it has no conceivable relevance to any of Owen Diaz’s claims and must be excluded. Fed. R. Evid. 401, 402. Furthermore, even if this general topic had any relevance (it does not), Nigel Jones’ testimony could not

1 be relevant because he began work at Tesla in 2017 and presumably was made an employee sometime  
2 after that, which was long after Owen Diaz worked at Tesla.

3 Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Nigel Jones should be  
4 excluded. The “me too” testimony should also be excluded under Rule 403 because a minimum of four  
5 mini trials would be required to assess the validity of (1) his alleged “multiple” complaints to Human  
6 Resources (the actual number is unknown); (2) comments he is aware of that were directed to other  
7 African American workers (the number is unknown); (3) whether he made a complaint to Human  
8 Resources about all or any of the preceding incidents; (4) how Human Resources handled each of those  
9 complaints; (5) and his transition from contractor to regular employee.

#### 10 **5. Jakel Williams – Different Department, Different Job, Different Supervisors**

11 Another client of Plaintiff’s counsel, Jakel Williams, is going to testify to the “racially harassing  
12 and discriminatory working environment in Tesla’s Fremont factory in 2018,” according to Plaintiff’s  
13 Witness List. Jakel Williams was a security guard working in 2018 (two years after Owen Diaz stopped  
14 working at Tesla). She did not have the same job, work in the same department or have the same  
15 supervisors as Owen Diaz. Nor was she identified as an alleged harasser of Owen Diaz, and as with the  
16 other “me too” witnesses, does not purport to have alleged harassment by the same harassers as Owen  
17 Diaz. Plaintiff’s Witness List also states that she will testify to “Wayne Jackson’s handling of complaints  
18 of racial harassment and discrimination.”

19 Testimony about what Jakel Williams may have personally experienced as a security guard, long  
20 after Owen Diaz was at Tesla, in a different department and with different supervisors has no bearing on  
21 the alleged work environment of Owen Diaz. Fed. R. Evid. 401, 402. Nor does her purported testimony  
22 about how Wayne Jackson (a nextSource on-site representative) may have handled unspecified  
23 complaints from unspecified workers *in 2018* have any possible relevance to Plaintiff’s work  
24 environment from June 2015 to March 2016. *Id.*

25 Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Jackel Williams should be  
26 excluded. The “me too” testimony should also be excluded under Rule 403 because at least three mini  
27 trials would be required to assess the validity of her claims about (1) the work environment in 2018; (2)  
28 Wayne Jackson’s handling of complaints in 2018; and (3) the merits of any such complaints handled by

Wayne Jackson in 2018.

**6. Melvin Berry – Different Department, Different Job, Different Supervisors**

Melvin Berry was only identified as being represented by Plaintiff’s counsel *after* the close of discovery. During the pendency of the case, however, the provided contact information for Melvin Berry was “unknown.” He should be excluded on that basis alone. Fed. R. Civ. P. 37(c)(1). Plaintiff’s Witness List states he will testify that “he heard leads and supervisors use the N-word frequently” and that leads and supervisors “used [sic] to word to him” and also that he “complained to HR and nothing was done.” Melvin Berry worked as a Material Handler in the production area of the Fremont facility from June 18, 2015 to October 21, 2016. He did not work in the same department or have the same supervisors as Owen Diaz. Nor was he identified as an alleged harasser of Owen Diaz or a witness to any such alleged harassment. He also does not allege harassment by any of Owen’s alleged harassers. Testimony about what Melvin Berry may have overheard his leads or supervisors (who were not those of Owen Diaz) say in a different department has no bearing on the alleged work environment of Owen Diaz. Fed. R. Evid. 401, 402. Nor does any complaint Melvin Berry might make about himself from unspecified people when he was doing a different job than Owen Diaz, in a different department, with different supervisors than Owen Diaz. *Id.* As Plaintiff noted in their motions *in limine* that were exchanged during the parties’ meet and confer, “witnesses’ experiences of hearing the n-word in locations temporally and spatially removed from Plaintiffs is not relevant to evaluating the hostility of Plaintiffs’ working environment.” Likewise, any complaints Melvin Berry may have made to Human Resources and the outcome of those complaints is not relevant to Owen Diaz’s working environment. *Id.*

Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Melvin Berry should be excluded. The “me too” testimony should also be excluded under Rule 403 because multiple mini trials would be required to assess the validity of his claims that (1) leads in his department used the n-word (the number of times is unknown); (2) supervisors in his department used the n-word (the number of times is unknown); (3) the n-word was direct at him (the number of times is unknown); (4) whether he complained to Human Resources for each of the instances (1) and (2) and how it was handled by Human Resources .

1                   **7. Demetric Di-az – Former Plaintiff in a Different Department, Different Job,**  
 2                   **Different Supervisors**

3           Demetric Di-az is a former plaintiff, who was dismissed by stipulation<sup>7</sup>, during the pretrial  
 4 conference statement and pretrial filings process. Despite the dismissal, Plaintiff’s Witness List indicates  
 5 that Plaintiff intends to call Demetric Di-az to testify “about the hostile work environment at the Tesla  
 6 Factory.” No such testimony should be permitted. Demetric Di-az was a West Valley employee who  
 7 worked a scant two months at Tesla in 2015, in the Battery department, which is part of the production  
 8 area. This was a different department, a different work area and with different supervisors than Owen  
 9 Diaz. During his brief time at Tesla, Demetric did not make any written complaints about any alleged  
 10 race-based harassment or discrimination. His employer, West Valley, does not have any record of  
 11 Demetric Di-az complaining about race harassment, discrimination, or threats during his time at Tesla.  
 12 Haines Decl., Exh. 3 (4/24/19 T. Kossayian Dep.), 76:14-17. Neither does Tesla. Id. at Exh. 4 (5/29/19  
 13 A. Heisen Dep.), 146:10-12. Instead, the only information about Demetric Di-az’s complaints is from his  
 14 own testimony in this litigation. Three years after his scant time at Tesla, Demetric Di-az testified at  
 15 deposition that he made verbal complaints. None of Demetric Di-az’s alleged harassers were those of  
 16 Owen Diaz. Nor was Demetric Di-az a witness to any alleged harassment of Owen Diaz. Thus,  
 17 Demetric Di-az’s testimony would not be relevant to Owen Diaz’s work environment. Fed. R. Evid. 401,  
 18 402.

19           Under the criteria in *Obrey* and *Grade*, all “me too” testimony from Demetric Di-az should be  
 20 excluded. The “me too” testimony should also be excluded under Rule 403 because mini trials on every  
 21 claims that Demetric Di-az just dismissed would be required to assess the validity of his litigation-based  
 22 claims that he suffered any alleged harassment and the result of his alleged reporting of harassment.

23           **B. Motion In Limine No. 2 – Exclude Putative “Me Too” Documentary Evidence**

24           By this motion, Tesla seeks to exclude any documentary evidence from any “me-too” witness or  
 25 about any “me too” witness. To the extent Plaintiff seek to elicit testimony from witnesses about other  
 26 “me too” witnesses or complaints reflected in emails, the criteria in *Obrey* and *Grade* should preclude all  
 27 \_\_\_\_\_

28           <sup>7</sup> Demetric voluntarily dismissed his case in 2020 presumably because of his 2020 plea agreement related  
 to his 2018 armed robbery of a Domino’s pizza restaurant. Trial Exh. 378.\_\_\_\_



such testimony. To the extent Plaintiff seeks to introduce documents (or testimony about the documents) that contain reports or pictures of alleged offensive writings, these are even more remote as to relevance and similarity to Plaintiff's allegations. None of the purported "me too" witnesses or documents containing other complaints, including complaints about writings, involve parties. These purported claims of harassment or discrimination have not been determined, and would be unfairly prejudicial to Defendant. Each would necessitate holding a its own mini trial to determine if the complaint or claim had any merit, which would cause undue delay and wasting time as well as unfairly prejudicing Defendant and confusing and misleading the jury. *Duran*, 221 F.3d at 1133; *Hill v. Grade*, No. 18-cv-01474-HSG, at \*3-4 (N.D. Cal. Sep. 4, 2019); Fed. R. Evid. 403. All such putative "me too" evidence should be excluded, whether through precluding any witnesses' testimony and excluding the underlying documents.

**1. Unrelated Complaints Made to West Valley After Plaintiff's Assignment at Tesla Ended**

By this motion, Tesla seeks to exclude all alleged complaints made to West Valley about workplace conduct after Owen Diaz's assignment ended, and in particular should be precluded from putting into evidence Plaintiff's Exhibits 70 and 113<sup>8</sup> which contain purported "me too" evidence or eliciting testimony about the information in these documents, which contain complaints made about a West Valley Staffing Group employee who was told to go back to the jungle, ninga. The conduct complained of occurred on April 15, 2017, almost one year after Owen Diaz worked at Tesla. The West Valley employees involved worked in the UBM area, were not in the same department and did not have the same supervisors as Owen Diaz. Moreover, the alleged harasser in this particular case did not work at Tesla until March 2017 and could not be (and was not) a person either plaintiff alleged was a harasser because Owen Diaz left in March 2016. Tesla would be forced to defend the allegations contained in such documentary evidence, including defending whether the alleged (unrelated) harasser harassed the

<sup>8</sup> The full set of these documents was produced by West Valley, Bate stamped WV000160-WV000179 (redacted) and WV000355-WV000392 (unredacted). West Valley marked both sets as "Confidential" pursuant to the Stipulated Protective Order.



(unrelated) complainants, and addressing the (unrelated) investigation into any of the allegations in the documents.

Under the criteria in *Obrey* and *Grade*, none of these documents containing “me too” assertions should be admitted and witnesses should be precluded from testifying about them. The “me too” evidence should also be excluded under Rule 403 because a mini trial would be required to assess the validity of any such claims.

## **2. Unrelated Complaint About a Car Name After Plaintiff’s Time at Tesla**

By this motion, Tesla seeks to preclude Plaintiff from introducing Plaintiff’s Exhibit 107 relating to the complaint and investigation of a “car name” that appears on the dashboard being changed or eliciting any testimony regarding these documents. This incident occurred on April 29, 2016, when Plaintiff was not working at Tesla. Furthermore, it happened in General Assembly, where Owen Diaz did not work. There is no evidence and no one can or will testify that Plaintiff was aware of this or knew about this during his assignment and there is no evidence that anyone involved in any aspect of Plaintiff’s employment may have been responsible for this. In fact, no one can testify as to who the alleged persons responsible were, based on Exhibit 107, and no one has authenticated the document.

The testimony of Josh Hedges and Alfonso Franco should be excluded for the same reasons. Plaintiff’s Witness list identifies Josh Hedges’ testimony as relating to Exhibit 107, which must be excluded, and to the extent Plaintiff also seeks to elicit testimony about the “widespread use of the N-word” that testimony must also be excluded. Josh Hedges was not timely identified in Plaintiff’s Initial Disclosures, and Plaintiff is excluded from calling him as a witness. Fed. R. Civ. P. 37(c)(1). To the extent Plaintiff may assert that he amended his Initial Disclosures to include Josh Hedges after receiving Exhibit 107, that amendment was made and served *after* the close of discovery and is untimely. Plaintiff did not seek relief from the Court for this deadline, despite the Court’s discovery order inviting Plaintiff to seek further discovery after the cutoff if needed. Plaintiff had no hesitation in so doing in relation to other documents produced at the same time as Exhibit 107. For example, Plaintiff sought leave from this Court (Dkt. No. 105) to take an additional deposition related to an individual named in an email in Exhibit 107 one week after discovery closed. Therefore, witnesses *not* identified by Plaintiff in his Initial Disclosures prior to the close of discovery should be excluded. Josh Hedges’ purported “me too”

1 testimony in addition to the car name complaint must also be excluded on the grounds of relevance and  
 2 undue delay. Fed. R. Evid. 401-403.

3 Similarly, although the name Alfonso Franco was listed in Plaintiff's Initial Disclosures, the  
 4 contact information was "Unknown" and the same, highly generalized description was used in both the  
 5 Initial Disclosures and Plaintiff's Witness list: that he had knowledge of the "racially harassing and  
 6 discriminatory working environment in Tesla's Fremont factory, as well as Tesla's failure to investigate  
 7 and prevent harassment." Furthermore, to the extent the witness' name appears in Exhibit 107, any "me  
 8 too" testimony from the witness about the exhibit or his purported work experience should also be  
 9 excluded.

10 Likewise, Plaintiff's designated expert Amy Oppenheimer should also be prohibited from  
 11 referencing or relying upon these documents at trial. The documents appear on her list of materials  
 12 reviewed,<sup>9</sup> and she testified at deposition that she relied upon these documents for her opinions. Haines  
 13 Decl., Exh. 5 (3/9/20 A. Oppenheimer Dep.), 93:4-6, 110:2-13. She also conceded that this occurred  
 14 after Owen Diaz left Tesla and that she had no information that it took place in connection with Owen  
 15 Diaz's workplace. *Id.* at 94:24-95:9.

16 Under the criteria in *Obrey* and *Grade*, Exhibit 107 containing "me too" assertions should not be  
 17 admitted and witnesses, including Josh Hedges and Alfonso Franco, should be precluded from testifying  
 18 about them. The "me too" evidence should also be excluded under Rule 403 because a mini trial would  
 19 be required to assess the validity of any such claims, as well as the involvement of Alfonso Franco and  
 20 Josh Hedges and the alleged "me too" evidence from Josh Hedges unrelated to Exhibit 107.

### 21 **3. Unrelated Complaints About Restroom Graffiti After Plaintiff's Time at** 22 **Tesla**

23 By this motion, Tesla seeks to preclude Plaintiff from introducing Plaintiff's Exhibit 109 relating  
 24 to the clean-up of restroom graffiti or eliciting testimony from Andres Donet or Liza Lipson about these  
 25 documents. In addition to testifying about Plaintiff's Exhibit 109, Liza Lipson is also identified as  
 26

27 \_\_\_\_\_  
 28 <sup>9</sup> Ms. Oppenheimer relied on a larger set of produced documents (TESLA-0000907-TESLA-0000918),  
 which also should be excluded because not all of them were contained in Exhibit 107 (TESLA-0000916-  
 TESLA-0000918),

1 testifying about “HR practices in response to racial epithets.” Neither Andres Donet nor Liza Lipson  
 2 were timely disclosed on Plaintiff’s Initial Disclosures, and Plaintiff did not seek leave of this Court to  
 3 extend those deadlines and supplement his Initial Disclosures. The witnesses should be excluded on that  
 4 basis alone. Fed. R. Civ. P. 37(c)(1). Furthermore, none of this testimony is relevant and should be  
 5 precluded because the graffiti that described and was removed in Exhibit 109 was in the restroom *after*  
 6 Owen Diaz’s assignment ended. Therefore, Plaintiff never saw this graffiti, nor can the documents  
 7 related to the graffiti be authenticated by any of the witnesses, and as such this “graffiti” was not part of  
 8 his workplace or his work environment. The graffiti occurred on May 21, 2016, when Owen Diaz was no  
 9 longer working at Tesla (his last day was in March 2016). Thus, this particular graffiti is not relevant to  
 10 Owen Diaz’s work environment and should be excluded. Fed. R. Evid. 401, 402.

11 The same reasons also preclude Plaintiff’s Human Resources expert, Ms. Oppenheimer from  
 12 referring to or relying upon Exhibit 109 at trial. This document was reviewed and relied upon by Ms.  
 13 Oppenheimer and appears on her list of materials reviewed. She testified at her deposition she relied  
 14 upon this document for her opinions, even though “it doesn’t have a direct impact on them [the  
 15 Plaintiff].” Haines Decl., Exh. 5 (3/9/20 A. Oppenheimer Dep.), 91:9-92:5, 110:2-13. Ms.  
 16 Oppenheimer’s testimony as to Exhibit 109 should be precluded as well.

17 Under the criteria in *Obrey* and *Grade*, Exhibit 109 containing “me too” assertions should not be  
 18 admitted and all witnesses, including Andres Donet, Liza Lipson, and Ms. Oppenheimer, should be  
 19 precluded from testifying about Exhibit 109. The “me too” evidence should also be excluded under Rule  
 20 403 because mini trials would be required to assess the validity of the claim about the graffiti, its clean-  
 21 up and general Human Resources’ practices relating to racial epithets.

#### 22 **4. Unauthenticated Document Never Produced In Discovery**

23 By this motion, Tesla seeks to exclude Plaintiff’s Exhibit 110, which Plaintiff’s counsel used at  
 24 Andres Donet’s deposition, over objection, because it was not produced during discovery, it is of  
 25 unknown provenance, and it is unauthenticated. *Id.* at Exh. 6 (10/24/19 A. Donet Dep.), 34:25-36:5. If a  
 26 party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not  
 27 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial,  
 28 unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). The document is

1 also unauthenticated and thus inadmissible. Fed. R. Evid. 901(a). Plaintiff should also be precluded  
2 from offering the testimony of Nathan Fraim to purportedly authenticate Exhibit 110. Nathan Fraim was  
3 only identified for this purpose on Plaintiff's Witness List.

4 Exhibit 110 appears to be a photograph of a poster with writing on it, and Tesla's counsel  
5 objected to its use at deposition because it had not been produced and discovery was closed. Plaintiff's  
6 counsel stated "[i]t's been produced in another case" and when Tesla's counsel pointed out it had not  
7 been produced in this case, Plaintiff's counsel's response was "[i]t doesn't have to be." Haines Decl.,  
8 Exh. 6 (10/24/19 A. Donet Dep.), 34:25-35:14. The "photo" in Exhibit 110 has not been authenticated,  
9 and cannot be authenticated by any witness in this case, it was not produced in discovery in this case  
10 through the initial disclosures or discovery requests (despite being responsive) and cannot be used at trial  
11 for any purpose. The context is important, namely that Andres Donet's deposition was taken *after* the  
12 close of discovery, pursuant to this Court's Order, at Plaintiff's request. Plaintiff's counsel could not  
13 provide any pertinent information about the unproduced document. Instead Mr. Organ represented that it  
14 "is reportedly something that was put up" in unspecified bathrooms and when asked when that occurred,  
15 Plaintiffs' counsel admitted "I don't have the exact date but my understanding is that it happened during  
16 this period." *Id.* at 35:16-36:5. The period being discussed at the deposition was a time when Owen  
17 Diaz no longer worked at Tesla. Finally, Donet could not identify the document. When he was asked  
18 "[y]ou haven't seen this before" the deponent answered "[n]o, no" and also confirmed that he did not  
19 remember it being reported to him stating "I've never seen it." *Id.* at 36:10-14. Thus, the document was  
20 not produced, is not relevant, remains unauthenticated and must be excluded. Fed. R. Civ. P. 37(c)(1);  
21 Fed. R. Evid. 901.

22 For the same reasons, the Court should exclude the testimony of Nathan Fraim, who was  
23 identified for this purpose for the first time on Plaintiff's Witness List, which states "he will authenticate  
24 Trial Exhibit 110." As detailed above, in Section I.A.2, Nathan Fraim began work on January 30, 2017,  
25 well after Owen Diaz had left Tesla. Thus, to the extent Nathan Fraim could authenticate this document  
26 – which was not produced in discovery – the document post-dates Owen Diaz's time at Tesla and has no  
27 relevance to Owen Diaz's work environment. Fed. R. Evid. 401, 402. Furthermore, Nathan Fraim is  
28 represented by Plaintiff's counsel and thus any information about the document and its production should

1 have been provided long ago. But even Nathan Fraim’s and Plaintiff’s counsel at deposition were unable  
 2 to make representations about the source of this exhibit. It is also unfairly prejudicial because it appears  
 3 to have an epithet written on it, and there is no way to assess the actual source or location where this  
 4 photo was taken (including whether it was even at a Tesla location) or that there are any indicia or  
 5 guarantees of trustworthiness. Thus, notwithstanding the foregoing arguments, it should be excluded as  
 6 inadmissible hearsay not falling within any exception. Fed. R. Evid. 801-802, 807.

7 Under the criteria in *Obrey* and *Grade*, Exhibit 110, containing “me too” assertions, which was  
 8 not produced and is unauthenticated should be not admitted and witnesses, including Nathan Fraim,  
 9 should be precluded from testifying about it. The “me too” evidence should also be excluded under Rule  
 10 403 because a mini trial would be required to assess the validity of Exhibit 110, to the extent that is even  
 11 possible.

#### 12 **5. Email Not Produced in Discovery and Sent After Plaintiff’s Time at Tesla**

13 By this motion, Tesla seeks to preclude the introduction of Plaintiff’s Exhibit 36, an email sent by  
 14 Elon Musk on May 31, 2017, because it was not produced by Plaintiff or by any other party, and it is  
 15 irrelevant because Owen Diaz could not have received it, as he was no longer at Tesla. Fed. R. Civ. P.  
 16 37(c)(1); Fed. R. Evid. 402.

17 Moreover, this Court previously relieved Tesla of its obligation to respond to a discovery request  
 18 relating to this document. Plaintiff requested that Tesla produce all documents sent or received by Elon  
 19 Musk discussing racial slurs from 2010 to the present, and in support of this request, Plaintiff referred to  
 20 this email<sup>10</sup> quoting a statement that people should be “thick skinned.” Dkt. No. 88, p. 3. This Court  
 21 determined that Tesla need not respond to the request because Plaintiff did not show a connection  
 22 “between Musk’s allegedly hostile attitude toward discrimination suits and the company’s response to  
 23 their own experiences with and complaints about racial discrimination.” Dkt. No. 93, 3:1-3. The same  
 24 ruling applies here in the much narrower context of trial: there is no connection between Exhibit 35 and  
 25 Owen Diaz and thus it must be excluded.

26  
 27  
 28 <sup>10</sup> The discovery dispute letter refers to Exhibit 40 because the email was marked as Exhibit 40 at Victor Quintero’s deposition.

For the same reasons, Plaintiff's Human Resources expert, Ms. Oppenheimer, should also be precluded from referring to or relying upon this document at trial. It appears on her list of materials reviewed and she testified at her deposition she relied upon a document that Owen Diaz should be "thick skinned" because she mistakenly testified that believes this was something Victor Quintero said. Haines Decl., Exh. 5 (3/9/20 A. Oppenheimer Dep.), 110:15-16, 111:5-12.

Under the criteria in *Obrey* and *Grade*, Exhibit 36 should not be admitted and witnesses, including Ms. Oppenheimer, should be precluded from testifying about it.

#### **6. Unrelated Complaint About Person Plaintiff Did Not Know**

By this motion Tesla seeks to preclude Plaintiff from introducing Exhibit 106, a December 30, 2015 complaint about Troy Dennis and from eliciting testimony about this exhibit because the email and the contents therein do not involve Plaintiff. The complaint involved alleged harasser Troy Dennis, then a forklift driver, whom Owen Diaz testified he did not know. When asked who Troy Dennis is, Owen replied "I don't know. Unless I can see him or a picture or something I wouldn't know." *Id.* at Exh. 7 (5/22/18 O. Diaz Dep.), 175:20-22. None of the alleged harassers in this complaint were those alleged by Owen Diaz, and it is not a complaint that Owen Diaz was aware of during his assignment at Tesla, and as such the complaint had no effect on the workplace or his perception of the workplace. Thus, Exhibit 106 is not relevant and would mislead or confuse the jury. Fed. R. Evid. 401-403.

Under the criteria in *Obrey* and *Grade*, Exhibit 106 containing "me too" assertions should not be admitted and all witnesses should be precluded from testifying about it. The "me too" evidence should also be excluded under Rule 403 because a mini trial would be required to assess the validity of any such claims contained in Exhibit 106.

#### **7. Unrelated Complaint From Person in Different Work Area with Different Supervisors Than Plaintiff**

By this motion, Tesla seeks to preclude Plaintiff from introducing Exhibit 108, a December 11, 2015 complaint made by an Jeff Henry, who worked in Chassis 3 and from eliciting testimony from any witnesses about Exhibit 108, including Maggie Crosby, Paul James, Josh Mantz and Jeff Henry. Jeff Henry's complaint did not involve Owen Diaz. Chassis 3 is not the same department where Owen Diaz worked, and the supervisors for Chassis 3 were different than those for Owen Diaz. Furthermore, the

Human Resources business partner who was covering the Chassis 3 area was not the same business partner who covered Owen Diaz's work area. Haines Decl., Exh. 8 (10/21/19 E. Marconi Dep.), 18:21-19:22, 82:6-18). None of the alleged harassers in this complaint were those alleged by Owen Diaz.

The same reasoning applies to preclude the testimony of Plaintiff's newly identified witnesses: Jeff Henry, Maggie Crosby, James Paul and Josh Mantz. Jeff Henry is also identified as testifying about "knowledge of the racially discriminatory working environment including the N-word in Tesla's Fremont factory . . . as well as Tesla's failure to investigate and prevent harassment." James Paul is also identified as testifying "regarding Tesla practices in responding to complaints about the N-word." Maggie Crosby, James Paul, and Josh Mantz are both identified on Plaintiff's Witness list as Human Resources witnesses who would testify about investigating the Jeff Henry complaint. Maggie Crosby is also identified to testify that she "received complaints of harassment and discrimination including a complaint by Jeff Henry" which indicates that she would offer other "me too" testimony. Similarly, Josh Mantz is also identified as testifying about being "in charge of leadership development training." None of this "me too" testimony should be permitted.

None of these witnesses were timely identified on Plaintiff's Initial Disclosure, and Plaintiff did not seek leave of this Court to extend those deadlines and supplement his Initial Disclosures and as such Defendant was precluded from conducting any discovery, or even depositions of any of these individuals. The witnesses should be excluded on that basis alone. Fed. R. Civ. P. 37(c)(1). Ms. Oppenheimer should also be precluded from testifying about this document, which she relies upon and which was identified in her list of materials. Haines Decl., Exh. 5 (3/9/20 A. Oppenheimer Dep.), 86:21-87:20. Ms. Oppenheimer concedes that there is no information in Exhibit 189 about Owen Diaz and that she does not know he knew the individual. *Id.* at 92:22-93:3. Ms. Oppenheimer also incorrectly testifies that "some of the management individuals are the same" in Exhibit 189, but in fact all of the email threads are among HR personnel except for the initial complaint which does not contain any supervisor or manager for Owen Diaz.

Under the criteria in *Obrey* and *Grade*, none of these documents containing "me too" assertions should be admitted and witnesses should be precluded from testifying about them. The "me too" evidence should also be excluded under Rule 403 because multiple mini trials would be required to



1 assess the validity of (1) Jeff Henry’s claim about use of the n-word; (2) Jeff Henry’s knowledge of the  
 2 work environment in Chassis 3; (3) Jeff Henry knowledge about any alleged failure by Tesla to  
 3 investigate an unspecified number of claims; (4) Maggie Crosby’s knowledge of alleged harassment and  
 4 discrimination complaints; (5) Maggie Crosby’s knowledge about the Jeff Henry complaint; (6) Josh  
 5 Mantz’s knowledge of the Jeff Henry complaint; (7) Josh Mantz’s knowledge relating to “leadership  
 6 development training.; (8) Paul James’ knowledge about “practices in responding to complaints about the  
 7 N-word.”

8 **C. Motion *In Limine* No. 3 – Putative “Me Too” Witnesses to Be Limited to Percipient**  
 9 **Witness Testimony**

10 None of the witnesses below satisfy the criteria in *Obrey* and *Grade* and all “me too” testimony  
 11 should be precluded under Rule 403 to prevent wasting time and undue delay because multiple mini trials  
 12 would be required to assess the validity of any such claims. Only percipient witness testimony related to  
 13 Owen’s alleged harassment claims should be permitted – to the extent it is otherwise admissible.

14 **1. Former Plaintiff Lamar Patterson**

15 Chartwell employee Lamar Patterson is a former plaintiff in this case who settled with Chartwell  
 16 and then dismissed his case with prejudice as to Chartwell and Tesla. Because Lamar Patterson testified  
 17 at deposition that he never made any complaints with anyone, either formal or informal, during the time  
 18 he worked at Tesla, he should be precluded from offering any “me too” testimony as to Owen Diaz.  
 19 Haines Decl., Exh. 9 (7/26/19 L. Patterson Dep.), 18:9-18. Plaintiff’s Witness List states he will testify  
 20 about “harassing conduct in the same are [sic] where Owen worked as well as Tesla’ failure to adequately  
 21 address the harassment.” This should not be permitted. Lamar Patterson should only be permitted to  
 22 provide percipient personal knowledge testimony, to the extent it is admissible, about conduct or  
 23 encounters involving Owen Diaz. Fed. R. Evid. 602. Any other testimony “me too” testimony would be  
 24 irrelevant, more prejudicial than probative and could confuse or mislead the jury as well as requiring a  
 25 mini trial to determine the merits of any underlying complaints. Fed. R. Evid. 403.

26 Specifically, Lamar Patterson should be precluded from offering testimony about Ramon  
 27 Martinez because he lacks personal knowledge. Fed. R. Evid. 602. He admits he did not work with  
 28 Ramon Martinez and only knew him through other workers and only talked to him about work-related



1 matters about 2 to 3 times. Haines Decl., Exh. 9 (7/26/19 L. Patterson Dep.). 59:11-60:16. Nor did  
2 Lamar Patterson and Owen Diaz work in the same area as Ramon Martinez. *Id.* at 61:5-7. Lamar  
3 Paterson testified that he only saw Owen Diaz interacting with Ramon Martinez on work-related matters  
4 twice, and he did not recall anything about either encounter other than that they were work-related. *Id.* at  
5 60:11-61:10. Furthermore, Lamar Patterson was not a percipient witness to the January 22, 2016 cartoon  
6 incident involving Ramon Martinez. Instead, Patterson “may” have seen the cartoon drawing *after*  
7 Owen Diaz told him about it. *Id.* at 64:22-65:1. And to the extent Owen Diaz told him how he thought it  
8 was offensive, any such testimony would be cumulative and should be excluded. *Id.* at 62:19-63:23; Fed.  
9 R. Evid. 403.

10 For the same reasons, Lamar Patterson should be precluded from offering other “me too”  
11 testimony that did not involve Owen Diaz, as well as any alleged failure to address the purported  
12 harassment of non-parties. It would be unfairly prejudicial to Defendant because Lamar Patterson’s  
13 deposition was taken in this case *only* as to his role as an alleged witness to Owen Diaz’s claims – not  
14 about any claims he himself may have made involving other non-parties. When Defendant’s counsel was  
15 questioning Lamar Patterson about the interview process with Chartwell, Plaintiff’s counsel objected  
16 stating “this is a deposition in the Diaz matter. And I know some of these questions are foundational, but  
17 a lot are not relevant to the Diaz matter.” *Id.* at 36:25-37:13. Plaintiff’s counsel further clarified “this is  
18 not Lamar’s deposition for his case. This is really a deposition in the Diaz matter, and he is a witness.”  
19 *Id.* at 38:1-3. Thus, not only would such “me too” testimony be irrelevant, it would unfairly prejudice  
20 Defendant under Rule 403 because Defendant did *not* have the opportunity to depose Lamar Patterson on  
21 his own claims, but only those as a witness to allegations involving Owen Diaz. In short, given that  
22 counsel precluded potential “me-too” testimony during discovery, they cannot present such testimony at  
23 trial.

24 All such testimony should also be excluded under Rule 403 because a number of mini trials  
25 would be required to determine the merits of any underlying complaints and the response to any such  
26 alleged complaints. Fed. R. Evid. 403.

1                   **2.       Tamotsu Kawasaki**

2           Tamotsu Kawasaki was a Chartwell employee. Haines Decl., Exh.10 (10/9/19 T. Kawasaki  
3 Dep.), 18:24-19:9. He should be precluded from offering any “me too” testimony about the alleged use  
4 of the n-word at unspecified places in the factory by people who he did not supervise or otherwise work  
5 with at the facility. *Id.* at 96:16-97:4. There is no connection to Owen Diaz, his workplace, his  
6 supervisors or any of his alleged harassers. Under the criteria in *Obrey* and *Grade*, this “me too”  
7 testimony, and it should also be excluded under Rule 403 because a mini trial would be required to assess  
8 the validity of any such claims.

9           To the extent that Tamotsu Kawasaki is permitted to testify, he should only be allowed to provide  
10 percipient witness testimony which involved being a witness to conduct or encounters involving Owen  
11 Diaz, including his investigation of those encounters or conduct. Fed. R. Evid. 602. Any other testimony  
12 would be irrelevant, more prejudicial than probative and could confuse or mislead the jury as well as  
13 requiring a mini trial to determine the merits of any underlying complaints. Fed. R. Evid. 403.

14                   **3.       Michael Wheeler**

15           Michael Wheeler was never employed by Tesla but instead worked for Chartwell. Haines Decl.,  
16 Exh. 11 (6/12/19 M. Wheeler Dep.), 13:5-8, 95:25-96:2. He should be precluded from offering any “me  
17 too” testimony. Plaintiff’s Witness list states he will testify regarding the “hostile work environment for  
18 African Americans.”

19           Michael Wheeler should be precluded from testifying about any such “me too” evidence.  
20 Specifically, he should be precluded from offering testimony about an incident involving him and Jesus,  
21 whose last name he cannot remember, who he claimed called him the n-word and was also promoted. *Id.*  
22 at 19:2-17. He cannot remember when this allegedly occurred, only that it was on the east side of the  
23 building where the fork lifts were charged. *Id.* at 22:1-5. This is not connected with Owen Diaz’s work  
24 area, it does not involve Owen Diaz and thus is not relevant. Nor is “Jesus” is identified as one of Owen  
25 Diaz’s alleged harassers. Similarly, Michael Wheeler should be precluded from testifying about an  
26 incident involving his cart that was in a parking lot – which again not in Owen Diaz’s work area. *Id.* at  
27 55:17-56:3. Nor could Michael Wheeler testify that this incident was related to race. *Id.* at 57:8-12. The  
28 same reasoning requires the exclusion of his observation of the swastika head tattoos of an unknown

1 person in an unknown location (Wheeler did not even have knowledge of whether this person worked at  
2 Tesla), which he did not report to Human Resources. *Id.* at 113:12-114:20.

3 To the extent Michael Wheeler is permitted to testify, he should only be allowed to provide  
4 percipient witness testimony which involved him being a witness to conduct or encounters involving  
5 Owen. Fed. R. Evid. 602. Any other testimony would be irrelevant, more prejudicial than probative and  
6 could confuse or mislead the jury as well as requiring a number of mini trials to determine the merits of  
7 any underlying complaints. Fed. R. Evid. 403.

#### 8 **4. Wayne Jackson – nextSource On-Site Representative**

9 Wayne Jackson was a nextSource Program Manager, who was a liaison between Defendant and  
10 workers employed by staffing companies. Haines Decl., Exh. 12 (5/17/19 W. Jackson Dep.), 17:8-18:13.  
11 He worked on-site at the Tesla Fremont facility. *Id.* at 76:5-20. Plaintiff’s Witness List states he will not  
12 just offer testimony about conduct connected with Owen Diaz but will also testify about unspecified  
13 “harassing conduct . . . directed at others.”

14 He should be precluded from offering any “me too” testimony about unspecified harassing  
15 conduct directed at non-parties, as well as whether he once heard the n-word used at an unspecified area  
16 of the factory at an unknown time. First, as to Wayne Jackson overhearing the n-word, it did not involve  
17 Owen Diaz. Second, Wayne Jackson’s role required him to support three shifts and was often walking  
18 from one side to another of the 5 million square foot Fremont facility. Haines Decl., Exh.12 (5/17/19  
19 W. Jackson Dep.), 76:5-20. Thus, he could have overheard it anywhere in the 5 million square foot  
20 factory. Nor is there any connection to Owen Diaz’s work area, his supervisors, or his alleged harassers.  
21 Wayne Jackson did not know who might have said it; it was just something he overheard. *Id.* at 148:25-  
22 149:8. Also, he did not report this one instance to Human Resource. *Id.* at 146:6-11. Likewise,  
23 Plaintiff’s suggestion in their Witness List that he would testify to other unspecified “harassing conduct”  
24 not directed at Owen Diaz must be excluded.

25 Under the criteria in *Obrey* and *Grade*, this “me too” testimony from Wayne Jackson should be  
26 excluded, and his testimony should be limited to percipient witness testimony involving conduct or  
27 encounters with Owen Diaz, including his investigation of those encounters or conduct. Wayne  
28 Jackson’s “me too” testimony should also be excluded under Rule 403 because many mini trials would

1 be required to assess the validity of these claims, wasting time and causing undue delay.

2 **D. Motion *In Limine* No. 4 - Exclude Impermissible Demonstratives and Shock Props**

3 By this motion, Tesla anticipates that Plaintiff's counsel may attempt to carry, show or use as a  
4 demonstrative a book written by Harvard Professor Randall Kennedy entitled "nigger," and Plaintiff's  
5 counsel should be precluded from doing so because the book is not relevant to any of Plaintiff's claims,  
6 and is not admissible for any purpose.<sup>11</sup> Fed. R. Evid. 401, 402. Plaintiff's counsel's clear intention is to  
7 inflame the jury with the provocative book and to "encourage" them to obtain the book during the trial.

8 The book in question was written by Randall Kennedy and was published in 2002. It was  
9 published 13 years before Plaintiff began work at Tesla. It is not identified on any of Plaintiff's  
10 designated experts' reliance materials lists. Furthermore, the book was not produced during discovery.  
11 Thus, it is irrelevant and inadmissible because it contains no information about, referring to or relating to  
12 Plaintiff and his time at Tesla.

13 Even if the book were admissible – it is not – it should be excluded as unfairly prejudicial under  
14 Rule 403. The book's cover is dark brown, with the title word "nigger" written in large, bright, white  
15 letters in the center of the cover. The viewer's eye is immediately drawn to the one-word title in  
16 contrasting white lettering against a dark brown cover. Underneath, in much smaller type, that can't be  
17 read at a distance, is the book's subtitle "The Strange Career of a Troublesome Word." At the time it was  
18 published many people condemned the cover and title as crude marketing techniques, but the author  
19 unabashedly endorsed the title stating "I write a book to be read." *See, e.g.,* A Black Author Hurls That  
20 Word As A Challenge, NY Times, David D. Kilpatrick Dec. 1, 2001.<sup>12</sup>

21 The book's only function would be as a shock prop, carried or displayed by Plaintiff's counsel to  
22 startle the jury and would be unfairly prejudicial under Rule 403. Other courts routinely exclude this  
23 type of evidence. Rule 403's unfair prejudice language "means an undue tendency to suggest decision on  
24 an improper basis, commonly, though not necessarily, an emotional one." *Cohn v. Papke*, 655 F.3d 191,  
25 194 (9th Cir. 1981)(quoting the Rule 403 Advisory Committee Notes). For example, *Cohn* was a

27 <sup>11</sup> In 2019, Plaintiff's counsel during an arbitration against Tesla used the book as a prop.

28 <sup>12</sup> <https://www.nytimes.com/2001/12/01/books/a-black-author-hurls-that-word-as-a-challenge.html>,  
viewed March 13, 2020.

